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No. 82-1922

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMERICAN MOVERS CONFERENCE AND BULK CARRIER CONFERENCE AS *AMICI CURIAE*

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MOTION OF AMERICAN MOVERS CONFERENCE AND BULK CARRIER CONFERENCE FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The American Movers Conference (hereinafter "AMC") and the Bulk Carrier Conference (hereinafter "BCC") hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the at-

torneys for the petitioners was requested but refused. The respondent has consented to the filing of the attached brief. Neither the AMC nor the BCC has been a participant in this case prior to this filing as *amici curiae*.

The AMC is the national trade association of the household goods moving industry. Many of its member motor carriers belong to state organizations which engage in collective intrastate ratemaking, the legality of which is under challenge in this action. In addition, certain of these state collective ratemaking organizations are associated with the AMC although none are among the petitioners in this case.

The BCC is a motor carrier rate bureau which engages in collective motor carrier ratemaking for both interstate and intrastate movements of bulk commodities by motor carriers.

If the decision of the Court of Appeals is upheld then the method of setting rates for intrastate motor carrier transportation in many states by carrier members of each organization and the activities of the associated state associations of the AMC will be in serious jeopardy. In addition, the BCC may be unable to continue its current practice of collective intrastate ratemaking. Consequently, this matter is of vital importance to each organization and to their members.

The Court of Appeals decision in this case, *United States* v. *Southern Motor Carriers Rate Conference*, 702 F.2d 532 (5th Cir. Unit B, 1983), dealt with the issue of compulsion by the states as a necessary part of the state action antitrust immunity doctrine. It is our position that, contrary to the view of the Court of Appeals, there was sufficient compulsion by the states to satisfy the compulsion element of the state action doctrine should this Court find such compulsion to be necessary for the state action doctrine to be applicable.

It is also our contention that in this matter the lower courts failed to examine the validity of the state interest in and active supervision of the particular motor carrier regulatory system devised by each of the states. Under the past decisions of this Court, such an examination is necessary when the issue of state action antitrust immunity is present. In addition, in this case, the lower courts failed to recognize the accepted role of private collective action as part of a regulatory system.

These legal issues were not developed by the petitioners in the litigation below and it is our understanding that they will not be presented by the petitioners to this Court. These issues are of very real importance to the questions involved and the interests of justice would not be served unless these legal issues were considered by this Court.

Accordingly, it is respectfully requested that leave to file the attached brief *amici curiae* on behalf of the AMC and the BCC be granted.

Respectfully submitted,

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BRIEF OF AMERICAN MOVERS CONFERENCE AND BULK CARRIER CONFERENCE AS *AMICI CURIAE*

American Movers Conference and Bulk Carrier Conference as *amici curiae*, support the position of Southern Motor Carriers Rate Conference, Inc., *et al.*, petitioners.

STATEMENT

The American Movers Conference is the national trade association of the household goods moving industry. Many of its member motor carriers belong to state organizations which engage in collective intrastate ratemaking, the legality of which is under challenge in this action. In addition, certain of these state collective ratemaking organizations are associated with the American Movers Conference although none are among the petitioners in this case. The current method of setting rates for the intrastate motor carrier transportation of household goods by the carrier members and the associated state associations may be seriously affected by the outcome of this case.

The Bulk Carrier Conference is a motor carrier rate bureau which engages in collective motor carrier ratemaking for both interstate and intrastate movements of bulk commodities by motor carriers. Its intrastate ratemaking activities could be seriously affected by the outcome of this case.

Neither the American Movers Conference nor the Bulk Carrier Conference has been a participant in this case prior to this filing as *amici curiae*.

ARGUMENT

I. Contrary to the View of the Court of Appeals for the Fifth Circuit, There Was State Action Compelling Motor Carriers to Participate in the Particular State Regulatory Schemes in Issue.

In *United States* v. *Southern Motor Carriers Rate Conference*, 702 F.2d 532 (5th Cir. Unit B, 1983), the Court of Appeals held that the collective formulation by motor carriers of rate proposals to be submitted to state regulatory officials for approval or rejection was not exempt from Section 1 of the Sherman Act (15 U.S.C. § 1) under the "state action" exemption because the partici-

pating carriers were not compelled by the respective states to so act. The appellate court was of the opinion that compulsion by the state was necessary for state action immunity to be available.

The Court of Appeals failed to analyze properly, from the standpoint of compulsion, the system of motor carrier regulation in effect in each state. The Fifth Circuit stated:

> But where the option to compete or join a system of state regulation at all is up to the private party, state action does not exist. *United States* v. *Southern Motor Carriers Rate Conference*, 702 F.2d at 541-542, footnote 18.

The Court of Appeals' assumption that motor carriers could elect to be regulated or not regulated by the respective states is incorrect. Motor carriers in the states with which this case is concerned (Alabama, Georgia, Mississippi, North Carolina and Tennessee) have an option as to whether they wish to participate in a collective manner at the *initial* stage of the state regulatory process, but the carriers have no option as to whether they will be regulated. As is reviewed by the District Court in its decision, each of the states in question has a statute charging a state commission with the specific duty of regulating motor carrier rates. *United States* v. *Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 473-476 (N.D. Ga. 1979). Motor carriers operating in these states are compelled by state statutes and commission rules to submit their rates to a state commission before the rates become effective and the various commissions are charged under the applicable state law with ensuring that such rates are reasonable. Consequently, the states do compel motor carriers to submit to state regulation of their rates and the Court of Appeals is incorrect in holding that motor carriers were not compelled by the states to be subjected to rate regulation.

The rate "collusion" that the government has charged the bureaus with engaging in is a product of state regu-

lation. If the states did not regulate the rates of motor carriers there would be no commission to which rate proposals would be submitted. The "collusion" alleged is part of the state's regulatory process; take away from the states the option of allowing collective preliminary rate formulation and state rate regulation would remain. The numerous motor carrier rates would still be subject to review by state officials, only a state's option to allow initial rate development by those carriers choosing to do so collectively would be gone. In fact, as indicated by state officials to the District Court and as recognized by the District Court, the ability of the states to regulate effectively motor carrier rates is dependent on the collective process. *United States* v. *Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, *supra*, at 477.

Here, certain states have elected to streamline their rate review process by allowing private groups to submit rate proposals. However, the states have avoided requiring carriers to join such groups for the purposes of preliminary rate proposal development if carriers do not so desire. This allows for more efficiency in the state rate review process.

The collective rate development in issue is part of each state's compulsory rate regulation system; the option to carriers allowed by the regulatory structure of each state is to decide whether to initially proceed with rate development individually or collectively. However, the carriers have no choice as to whether their rates will be subject to state regulation.

II. The Lower Courts Failed to Examine the Validity of the State Interest in and Active Supervision of the Particular Motor Carrier Regulatory System Devised by Each of the States.

What is at issue in this matter is whether states, as part of their regulatory procedure, may permit motor carriers to engage in collective rate development in ac-

cordance with state regulations prior to submitting those rates to a state agency for review, the submission of rates being compelled by state law. There is nothing in this Court's prior rulings on state action matters that would prevent such collective action as part of the process by which a state regulates motor carrier rates.

The past state action antitrust immunity opinions of this Court make it clear that if a state indicates there is a need for regulation of a particular market segment of an industry such regulation may be accomplished if supervised by the state even if there are anticompetitive aspects to the regulation. These cases have all emphasized the importance of the existence of a clearly articulated state policy to deal with a recognized problem. However, these decisions do not mandate a particular method by which a state must deal with the state recognized problem. Each of this Court's decisions shielding particular action from the antitrust laws due to state action has recognized that a state may decide to control the identified activity as the particular state has elected to even if the program otherwise was contrary to the purposes of the Sherman Act.

In *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court placed major emphasis upon the economic conditions of the grape industry as justification for California establishing regulations for the marketing of raisins even though the particular state system had anticompetitive ramifications. 317 U.S. at 363-367. Similarly, in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), this Court noted that Arizona's interest in regulating lawyer advertising was long established and recognized by Arizona's legislature. 433 U.S. at 361-362. Again, in *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978), it was held that a state regulatory system was free from antitrust attack under the state action exemption because the state statute clearly dealt with what the state felt was a problem of "abusive and oppressive acts"

by automobile manufacturers toward automobile dealers. 439 U.S. at 101.

Similarly, in those cases where this Court has found the state action doctrine not to be applicable in shielding particular activity from the antitrust laws the key issue in each was whether there was a clearly articulated and enforced state policy regulating a particular subject. Hence in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), concerning bar association minimum fee schedules, it was found that "state law simply does not refer to fees." 421 U.S. at 790. In *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), which concerned a utility's distribution of light bulbs, it was stated in the plurality opinion that:

> [t]he distribution of electric light blubs in Michigan is unregulated . . . . The Commission's approval of respondents decision to maintain such a program does not, therefore, implement any statewide policy relating to light blubs. 428 U.S. at 584-585.

In *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which involved vertical price restraints on wine sales, it was found that "[t]he state has no direct control over wine prices, and it does not review the reasonableness of the prices set by the wine dealers." 445 U.S. at 100.

This Court's other two rulings concerning state action antitrust immunity both found the doctrine inapplicable because there was no clearly articulated state policy delegating to local governments regulatory powers over the commercial area in issue. *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389 (1978).

These prior state action doctrine opinions face the issue of whether a state has clearly articulated a state policy pertaining to a recognized problem. In this case,

the Court of Appeals failed to examine whether there was a clearly articulated state policy. If a state were to identify a need to protect shipper interests and to prevent unreasonable or discriminatory motor carrier rates and establish a regulatory procedure to control that identified problem there is nothing in the past decisions of this court which would prevent a state from doing so even if there were anticompetitive aspects to the regulatory procedure established. This is especially true in certain segments of the motor carrier industry such as the movement of household goods or the movement of bulk commodities.

Household goods are usually moved directly for individual howeowners who often lack even a basic knowledge of the problems and scope of a household goods move. In effect, a lifetime of family possessions, often constituting a major portion of a family's assets, are being entrusted to others. Accordingly, states may well recognize a consumer protection responsibility toward such shippers so that rates are not so low that inadequate service is provided to this class of shippers and that those carriers engaging in this particular type of motor carrier activity are stable in their management and rate structure.

Likewise, a state may recognize a particular problem concerning the movement of bulk commodities. This category of freight consists mainly of chemicals which can pose serious environmental problems if not properly transported. States may well clearly articulate a need to ensure that only motor carriers which are financially viable and have adequate revenue returns to maintain quality service operate, on an intrastate basis, transporting chemical products.

The previous decisions of this Court dealing with the state action doctrine do not bar a state from specifically recognizing the possibility of problems of concern to all those using motor carrier services or of concern to spe-

cifically identified categories of shippers with particularized service problems (e.g. consumer or environmental concerns). A state must, under the established view of the state action doctrine, regulate the identified activity if antitrust immunity is to be available, but the Sherman Act should not be used to prevent a state from utilizing particular forms of regulation.

None of this Court's decisions dealing with the state action doctrine questioned the wisdom of the manner in which a state chose to enforce a state-recognized problem so long as there was enforcement. However, in the matter now before this Court it is actually the manner in which particular states have elected to regulate which the government is questioning. It is clear from the review of the state statutes undertaken by the District Court that each state has a clearly articulated state policy of regulating motor carrier rates. This is certainly different from those cases of this Court which have found the state action doctrine inapplicable. The government here challenges the method of state control. The government attacks the practice of each state, as part of its regulatory system, permitting carriers to collectively formulate rates in accordance with rules set by state commission to be submitted to a state agency for review. *See United States* v. *Southern Motor Carriers Rate Conference*, 439 F. Supp. 29, 42 (N.D. Ga. 1977). Other state action exemption cases decided by this Court, whether such exemption was found available or unavailable, did not attack the process by which a state regulated a situation after it was established that the state had clearly articulated a need to control a particular commercial function and did in fact regulate that function. Here the government seeks to alter this Court's traditional view of the state action exemption by challenging not the fact of a state's regulations or a state's clearly articulated need for regulation but a state's method of regulation.

We submit that there is no basis in this Court's past state action rulings that justifies permitting the courts to examine the process of state regulation once the need for such regulation is clearly articulated by the state either for all those utilizing motor carrier services or for particular categories of shippers and it is established that the state does regulate. To the contrary, this Court has clearly stated that a state may establish a regulatory mechanism "designed to displace unfettered business freedom." *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, *supra*, 439 U.S. at 109.

The situation here is not unlike that in *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982) where the Ninth Circuit held that the state action doctrine shielded from the Sherman Act a challenge to the practice in Arizona of race tracks first discussing among themselves the division of racing dates before the issue was submitted to a regulatory commission with ultimate approval authority. It was found that Arizona had a clearly articulated state policy concerning the allocation of racing dates and specifically provided for discussions among the race track operators to take place prior to state regulatory action. As is the case with the motor carrier bureaus, the discussions and preliminary agreements among race track operators was part of the state's regulatory process. 670 F.2d at 816.

The government's real attack upon the motor carrier bureaus concerns the mechanisms of state regulation, not whether the state actually regulates, for that fact is not in dispute. This Court has already made it clear that the particular process of regulation by the states is not to be examined under the Sherman Act once the existence of such regulation is established. As was quoted with approval in *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, *supra*,

> For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. 439 U.S. at 111.

III. Private Collective Action Within a Regulatory Framework Is a Well Accepted Part of Regulatory Systems and Such Regulatory Options Should Not Be Denied to the States.

It is a well accepted practice within various federal and state regulatory regimens to utilize private groups to formulate initial regulatory proposals which are then subject to review by a government authority. These regulatory acts delegating the power to take initial action to private organizations often involve activity which, like the activity of the motor carrier bureaus in the states in question, could be considered anticompetitive. Such federal systems do not contain any statutory exemption from the antitrust laws (despite clear Sherman Act violation questions) and none is needed because the action of the groups are but an initial stage in the regulatory process ultimately subject to review by a legislatively established government policy. For instance, the Commodity Exchange Act permits commodity traders to form an association to establish standards for members but does not make membership compulsory. 7 U.S.C. § 21. Ultimate review of the actions of the private industry organization is subject to the regulatory control of the Commodities Futures Trading Commission.

Similar regulatory systems utilizing private industry group activity at an initial regulatory stage are or have existed in a number of regulatory areas such as coal production under the Bituminous Coal Act of 1937, 15 U.S.C. § 828 (repealed 1966), (*see, Sunshine Anthracite Coal Co.* v. *Adkins*, 301 U.S. 381 (1940); medical services under the Public Health Services Act, 42 U.S.C. § 291c (*see, Association of American Physicians and Sur-*

geons v. *Weinberger*, 395 F. Supp. 125 (N.D. Ill.) *aff'd*, 423 U.S. 975 (1975)); Indian affairs under the Klamath Termination Act, 25 U.S.C. §§ 564-564x (*see*, *Crain* v. *First National Bank of Oregon*, 324 F.2d 532 (9th Cir. 1953)), securities trading under the Securities Exchange Act of 1934, 15 U.S.C. § 78f (*see*, *First Jersey Securities, Inc.* v. *Bergen*, 605 F.2d 690 (3d Cir. 1979)); and fruit production under the Agriculture Marketing Agreement Act, 7 U.S.C. § 608a(6) (*see*, *Whittenberg* v. *United States*, 100 F.2d 520 (5th Cir. 1938)).

Similarly, states have utilized private organizations to undertake initial regulatory functions, with state agency review, even though the subject of the group regulatory formation activity may involve sensitive issues under the Sherman Act. *See e.g.*, *Arnold* v. *Board of Barber Examiners*, 45 N.M. 57, 109 P.2d 779 (1941), *Herrin* v. *Arnold*, 183 Okla. 392, 82 P.2d 977 (1938), concerning price agreements by barbers and cosmetologists; *Pennsylvania Coal Mining Association* v. *Insurance Department*, 471 Pa. 437, 370 A.2d 685 (1977) concerning insurance rates; *Bettcher* v. *State*, 140 Colo. 428, 344 P.2d 969 (1959) concerning hospital charges.

In each of these federal and state programs private groups, as with the motor carrier organizations involved here, are utilized as a part of the regulatory process—a process ultimately subject to regulatory agency review and decision. This is a long accepted administrative law practice. The ultimate review of the government body serves as a sufficient government role to justify such delegations. As Professor Davis notes in his *Administrative Law Treatise*, 2d Ed., pp. 193-198, 204-206 and page 22 of the 1982 *Supplement*, such delegations to industry groups are proper administrative procedures provided there are either statutory or administrative standards applicable to the delegation or there are sufficient safeguards to insure proper application. In the matter now before this Court, there are standards in each state stat-

ute that rates must be reasonable and interested parties have the right to protest rates and have the rates suspended or cancelled where the rates are not justified, and the burden of proof is on the carrier or carrier organization.

In this case the lower courts failed to realize that the collective activity of the motor carriers was a recognized administrative option available to the states to utilize in their regulatory process.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Fifth Circuit, Unit B, should be reversed and the matter returned to the United States District Court for the Northern District of Georgia for the entry of an order of dismissal or in the alternative for a finding as to whether the states in question have a clearly articulated and affirmatively expressed policy which is enforced requiring motor carriers to submit their rates and charges to regulation by the respective states.

Respectfully submitted,

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